No. 637

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

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No. A-11.

ALTA VALENTINE,

Petitioner,

v.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND SUPPORTING BRIEF.

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LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO ISSUE TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Petitioner prays that a writ of certiorari issue out of this court to review:

(1) The judgment of the Supreme Court of the State of New Jersey, filed in the above entitled action on November 23, 1953 (R. 87); which judgment affirmed the judgment of the Superior Court, Appellate Division (R. 87); the judgment of the Appellate Division affirmed the judgment of the Law Division of said Court (R. 76); the judgment

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(In referring to that part of the record contained in the Joint Appendix the letter "a" is omitted, only the number of the page being used.

In referring to pages contained in the petition for rehearing, (pages 88 to 101, inclusive) the re-numbering is used instead of the numbers originally printed.)

of said Law Division, among other things, ordered and adjudged "that the Board of Education of the City of Jersey City, Hudson County, New Jersey, a body corporate, acquired a title of fee simple absolute in said premises No. 15 Dick Street, Jersey City, New Jersey (R. 57 and 58); * * * that said fee simple absolute * * * was acquired in condemnation award which issued out of condemnation proceedings filed in Hudson County Circuit Court on July 19, 1922" (R. 58).

"And * * * that complaint in the foregoing action for ejectment be and it is hereby dismissed" (R. 58).

In affirming this judgment the Supreme Court of New Jersey unexpectedly overruled all previous applicable decisions of courts in that State.

(2) Also to review the order filed in said Supreme Court of New Jersey on December 21, 1953 (R. 102), which denied the petition filed in said Supreme Court by the petitioner herein, seeking a rehearing of the appeal of the petitioner, upon which appeal the judgment had been entered in said last mentioned court on November 23, 1953 (R. 87), as aforesaid, said petition for rehearing alleging that the judgment of the said Supreme Court deprived petitioner of property without due process of law and contravened Article 14, Section 1 of the amendments to the Constitution of the United States.

Opinions Below.

The opinion of the New Jersey Superior Court, Law Division, will be found on page 42 of the record and is reported in 20 N. J. Superior, 454.

The opinion of the Appellate Division will be found on page 59 of the record and is reported in 25 New Jersey Superior 342.

The opinion of the New Jersey Supreme Court will be found on page 78 of the record and is reported in 100 Atlantic 2d 668.

I.

Summary and Statement of Matter Involved.

Public laws 1922, chapter 226, page 391 of New Jersey, which became effective on March 13, 1922, prescribed certain powers of the Board of Education created under the act to establish a thorough and efficient system of free public schools in New Jersey approved October 19, 1903.

The act of 1922 amended section 47 of the act of 1903 and it provided as follows:

> "47. Such board shall • • • have power to • • • purchase, lease, receive, hold and sell property, real and personal, take and condemn land and other property for school purposes in the manner provided by law regulating the ascertainment and payment of compensation for property condemned or taken for public use."

The law regulating the ascertainment of payment of compensation for property condemned or taken for public use is generally referred to as the Eminent Domain Act, which prescribed the method by which, among others, a municipal corporation could take land and other property for public use and this law was in effect in July, 1922 (P. L. 1900, c. 53, sec. 1).

In July, 1922 the Board of Education of the City of Jersey City instituted proceedings to take and condemn certain lands in said City (R. 1, 2) then owned by Emma Maslin (R. 1) who was the condemnee and plaintiff is a successor in interest of said condemnee (R. 5).

As a result of such proceedings, said Board of Education took and acquired title to said lands under the provisions of said acts (R. 2), but said lands were never used for school purposes (R. 3, 4, 8, 25).

On March 14, 1946, said Board of Education held a public sale of such lands (R. 3) to comply with R. S. 1937 of State of New Jersey 18:5-25 and 18:5-26 providing for the sale of school properties not deemed necessary for school purposes (R. 3).

These facts are admitted by adverse parties (R. 8, 14, 25).

In one of its defenses the Board avers:

> "The defendant in making this conveyance to Lester Lamont and Marion Lamont, his wife, relies on R. S. 18:5-25 and 18:5-26" &c. (R. 27).

This reference is to the Revised Statutes of New Jersey (1937), Title 18, Chapter 5, and reads as follows:

18:5-25:

> "A board of education may sell or dispose of any of its real estate, or rights or interests therein, which cease to be suitable or convenient for the use for which they were acquired or which are no longer needed for school purposes, whether such real estate or rights or interests were acquired by purchase or through condemnation proceedings. The purchaser shall acquire title to the property so sold free from any use or purpose for which it may have been acquired by the board."

18:5-26, provides for public or private sale.

In January, 1952, the petitioner, alleging that she had a right to enter the premises by reason of abandonment of property for school purposes, instituted an action in ejectment in the Superior Court of New Jersey, Law Division,

against the grantees named in said deed, Lester Lamont and wife, to recover possession of said lands.

On March 19, 1952, on their motion, the Board of Education aforesaid was added as a Third Party Defendant in said action (R. 17).

And on March 20th 1952, Anthony J. Lamont, as mortgagee of said grantees, applied for and was given leave to and did intervene in said action (R. 18).

On June 30, 1952, the Trial Court disposed of plaintiff's claim of a reverter (R. 57-58) by adjudging that:

> "The Board of Education of the City of Jersey City, Hudson County, New Jersey, a body corporate, acquired a title of fee simple absolute in said premises No. 15 Dick Street, Jersey City, New Jersey."
>
> "And it is further ordered and adjudged, that said fee simple absolute to No. 15 Dick Street, Jersey City, was acquired in condemnation award which issued out of condemnation proceedings filed in Hudson County Circuit Court on July 19, 1922."

On April 13, 1953, the Appellate Division affirmed the judgment of the Trial Court (R. 76).

On November 23, 1953, the Supreme Court of New Jersey affirmed the judgment of the Appellate Division (R. 87).

Within the time allowed by the rules of said Supreme Court and on December 2nd, 1953, a petition for rehearing was filed by the petitioner herein for a rehearing (R. 88) alleging specifically that the judgment from which she had appealed contravened the 14th Amendment because the effect of the judgment was to deprive her of her property without due process of law (R. 91).

On December 21, 1953, said Supreme Court denied said petition for rehearing (R. 102).

And now, on March 15, 1954 plaintiff in said action presents this petition to this court for a writ of certiorari to review the judgment of said Supreme Court of New Jersey and the order made by said court denying said petition for rehearing filed on December 21, 1953 as aforesaid.

II.

Basis upon which it is contended that this Court has jurisdiction to review the judgment in question.

The petitioner contends that this court has jurisdiction to review the judgment in question under the provisions of

U. S. C., Title 28, sections 1257 and 2101 62 Stat. 929 and 63 Stat. 104.

The grounds upon which it is contended the questions involved are substantial are that the judgment of the Supreme Court of New Jersey (R. 87) in this action is repugnant to the 14th Amendment to the United States Constitution.

And the order made herein by said court on December 21, 1953, denying the petition of the petitioner herein for a rehearing (R. 102) is likewise repugnant to said 14th Amendment.

The Federal questions sought to be reviewed were first raised in the Supreme Court of New Jersey, when that court, unexpectedly, overruled previous decisions recognized as the law in New Jersey previous to this action; the method of raising them was by petition for rehearing in that court (R. 88); the way in which they were passed upon by that court was by the entry of an order that the petition be denied (R. 102).

The petitioner was not granted a hearing upon her petition for rehearing because no justice who voted with the majority moved for a reconsideration (R. 102).

Questions Presented.

1. Under the applicable statutes of the State of New Jersey, can a condemnor exercising the right of Eminent Domain acquire thereby a fee simple absolute title to private property condemned for school purposes?

2. Is the effect of the order made by the Supreme Court of New Jersey on December 21, 1953, aforesaid (R. 102) to deprive petitioner of property without due process of law?

3. Is the construction placed by the New Jersey Supreme Court upon the statute, R. S. 18:6-24, holding that "the Legislature intended that a fee simple absolute title should be taken by eminent domain for school purposes" (86) repugnant to the 14th Amendment.

Reasons Relied on for Allowance of Writ.

(1) The Supreme Court of the State of New Jersey has, in this case, decided a federal question of substance not heretofore determined by this Court, namely, that under the statutes of New Jersey

> "* * * the Board of Education in this case took a fee simple title in the premises in question * * * and was authorized by the said statutes to convey a fee simple absolute title * * *" (R. 86).

The Federal question of substance involved is whether or not said Supreme Court, by its determination that such

statutes authorize the Board as such condemnor, to acquire thereunder a title in fee simple absolute, has not placed a construction upon such statutes that is repugnant to Article XIV, section 1, of the Amendments to the United States Constitution, which provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

(2) The Supreme Court of the State of New Jersey, has in this case, decided a Federal question in a way probably not in accord with the applicable decisions of this Court, namely:

This Court has held that the property of A cannot be transferred without his consent to B, by a legislative act.

Applying this rule to a condemnor, it necessarily follows that the property of A cannot be transferred, without his consent, to B, by a condemnor, who, exercising the right to acquire private property by eminent domain for public use, acquires the property of A and then subsequently conveys such property to B.

(3) There are special and important reasons why this writ should be granted.

On the one hand we have this Court declaring that the private property of A cannot be taken from him, without his consent, and given to B, by legislative action.

This certainly includes the adjudication that, either with or without compensation, the private property of A cannot be taken from him, without his consent, and given to B, for his private use, by legislative action.

On the other hand, we have decisions by State courts, adjudging that where the language of the statute involved is sufficient to disclose an intent on the part of the legislature that a condemnor should acquire a fee simple abso-

lute title to the property that was being taken and condemned, the fee simple absolute title does pass to the condemnor.

However, in all these cases the question considered and decided by the court was whether or not the language of the statute was sufficient to provide that a fee simple absolute title was to be acquired by the condemnor.

In no case was any question raised, considered or decided as to whether or not, when such a construction was placed upon the statute, it contravened the "due process of law" clause of the 14th Amendment.

When any State statute is so construed as to provide that a condemnor can acquire a fee simple absolute title to property, it is tantamount to an adjudication that, by State legislative action, to wit, condemnation proceedings, the private property of A can be taken from him, without his consent, upon the allegation that it is to be taken for public use and the condemnor, by complying with the statute, will acquire a fee simple absolute title to such property.

And once it is conceded that the condemnor has acquired a fee simple absolute title thereto it cannot be gainsaid that the condemnor has lawful authority to convey such property to any private person whomsoever for any private use whatever.

Thus, unless this Court shall hold that, where the protection of the Federal constitution is invoked, these decisions of these State courts are repugnant to the "due process of law" clause of the 14th Amendment, and must yield, we have, in the case at bar, a perfect illustration of how the property of A can be taken from him, without his consent, and given to B by legislative action, without limitation as to subsequent conveyance and uses.

In the case at bar the constitutional question has been raised as to whether or not State legislation providing that a fee simple absolute title to property can be acquired by a condemnor in condemnation proceedings violates the "due process of law" clause contained in the 14th Amendment.

If it is to be held that the decision of this court in *Wilkinson* v. *Leland, infra,* is still the law, then although the State court decisions may be sound insofar as they hold that the language of the State Statute itself is sufficient to provide that a fee simple absolute title may be acquired by condemnation proceedings, yet such a statute violates the due process clause of the 14th Amendment aforesaid and, therefore, such a statute is unconstitutional and void in this respect, if the constitutional question is raised.

This Court is the final arbiter upon this question. It affects the rights of every property owner in the nation and, therefore, in order that it may be determined, this writ should be allowed.

SUPPORTING BRIEF.

I.

The Federal claim made by the petitioner was timely under the circumstances of this case.

In 1930 the then New Jersey Supreme Court held that the power granted to the New Jersey State Highway Commission to sell lands or real estate which came "into its possession or control, * * * must be limited to such lands as to which it has acquired a fee by deed, gift, grant, or other lawful transfer from the owner. It was not intended to apply to 'rights of way' acquired by condemnation."

> *Frelinghuysen* v. *State Highway Commission,* 107 N. J. L. 218, 223; affirmed by the then highest State Court in 108 N. J. L. 403.

The statute considered in the *Frelinghuysen* case which granted to the Commission the right to acquire property by condemnation (P. L. 1927, c. 319, section 111 e), was re-enacted in the Revised Statutes of 1937.

And for the purpose of this inquiry the language may be considered as identical. It is there known as R. S. 27:7-22, and will be found on page 97 of the record.

The statute granting the Commission the right to sell lands acquired when they are no longer required by the Commission for use (P. L. 1926, c. 96), was re-enacted in the Revised Statutes of 1937.

And for the purpose of this inquiry the language may be considered as identical, at least so far as the power of sale is concerned. It is there known as R. S. 27:12 and will be found on page 97 of the record.

By P. L. 1935, c. 178, p. 440, the office of State Highway Commissioner was created and he succeeded to the powers and duties of the then State Highway Commission, and by section 3, p. 441, the State Highway Commission was abolished.

The statute under which the Board of Education was granted the right to acquire the lands in this case by condemnation (P. L. 1922, c. 226, p. 391) was re-enacted in the Revised Statutes of 1937.

And for the purpose of this inquiry the language may be considered as identical, at least so far as the power to acquire and the power to sell are concerned. It is there known as R. S. 18:6-24, and will be found on page 96 of the record.

Apparently some question must have arisen as to the sufficiency of these laws to enable the Board to sell lands acquired by condemnation and accordingly in 1929 the legislature passed an act (P. L. 1929, c. 333, p. 754) granting power to the Board of Education to

> "sell • • • lands • • • which • • • are no longer needed for school purposes, whether • • • acquired • • • by purchase or through condemnation proceedings for school purposes."

But this latter act could not in any way affect the rights of Emma Maslin, the condemnee, as they existed at and after the condemnation in 1922, nor could it affect the rights of those claiming under her, of whom petitioner is one (R. 33).

In 1947 the Circuit Court of New Jersey (not the highest court), had held (*Summerill* v. *Hunt*, 55 Atl. 2d 833):

> "The primary question for determination relates to the quality of the estate in the lands in question which was acquired • • • pursuant to the condemnation proceedings" (835).

"If, on the other hand, the traction company did not acquire such an estate," (an estate in fee simple absolute) "but only a qualified or conditional estate dependent upon a continuing use * * * and if such use has been abandoned, then * * * there will be a reversion of title to the owner, or his successor in title, the plaintiff, whose lands were taken by condemnation" (*Ibid*).

"Had the Legislature provided especially for the acquisition of title in fee simple absolute by condemnation, the question would at once arise as to the constitutionality of the act."

"It appears to be the settled law that a fee simple absolute cannot be acquired by condemnation" (837).

These two decisions were the recognized law in the State of New Jersey until the decision in the case at bar, and the petitioner in this court was justified in assuming that the highest court would follow the law as laid down in previous decisions.

In the present case, the now highest court of the State of New Jersey has departed from the previous law, and has expressly overruled the *Summerill* v. *Hunt* case (R. 86).

And, without comment, it did not follow the decision in the *Frelinghuysen* case, *supra,* which held that a condemnor could not sell lands which had been acquired by condemnation for public use (see p. 11, *supra*).

Under such circumstances this Court has upheld the right of a litigant to a review of any Federal questions involved.

The case of *Missouri, &c.* v. *Gehner,* 281 U. S. 313, 320, presents a situation identical in principle with the present case but the facts in that case were not quite so favorable to the right to the relief sought.

In the *Missouri* case the applicant for relief in this Court did not have a decision of a state court upholding its contention.

In the case at bar there were decisions, one in the highest State court which held that a condemnor could not sell lands which had been acquired by condemnation for public use.

Frelinghuysen case, *supra.*

And, of course, if such a condemnor could not sell, it necessarily follows that it did not acquire nor could it convey a fee simple absolute title to such lands.

And there was also a decision by a trial court holding that a fee simple absolute title cannot be acquired by condemnation.

Summerill case, *supra.*

In the *Missouri* case there had been no previous court decision. It was a first construction of a State statute.

In the *Missouri* case, this Court said (p. 320):

> "It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke Federal protection * * *."

How much more so was the petitioner in this case relieved from the necessity of anticipating that existing law would be overruled; or, in advance, invoking Federal protection, when she had decisions of the State courts in her favor!

In that case, this Court also said (p. 320):

> "Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the state the Federal questions here presented and is entitled to have them considered."

There the appellant had filed in the highest court a petition for rehearing wherein the Federal questions were first raised.

Just so, the petitioner in this case sufficiently raised in the highest court in New Jersey the Federal questions here presented by her petition for rehearing.

In that case this Court also said (p. 320):

> "But here, the company at the first opportunity invoked the protection of the Federal Constitution and Statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States."

Just so, the petitioner in this case, at the first opportunity, invoked the protection of the Federal Constitution.

Invoking such protection from the inferior tribunals would have been to no avail as an adverse decision on their part could not be brought to this Court for review.

It was incumbent upon the petitioner in this Court to first obtain a decision of the highest court in the State before she could seek relief in this Court.

This she did by her appeal to that court, and its decision, coming unexpectedly, in view of the previous decisions hereinbefore referred to, left her no alternative other than to file a petition for rehearing in which she raised the Federal questions involved, and when that court denied her petition, she thus became a party aggrieved in such a way that she has a right to come to this Court.

In the case of *Saunders* v. *Shaw*, 244 U. S. 317, 320, this Court said:

> "But when the act complained of is the act of the supreme court" (State) "done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a

serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way cannot come here."

In *Brinkerhoff &c.* v. *Hill,* 281 U. S. 673, this Court said:

"The powers and duties of the state tax commission are prescribed by article 4 of chapter 119 of the Revised Statutes of 1919. Six years before this suit was begun those provisions had been construed by the Supreme Court of Missouri, in Laclede &c. *v.* State Tax Commission, 295 Mo. 298, 243 S. W. 887" (676).

* * * * * *

"No one doubted the authority of the Laclede Land & Improv. Co. case until it was expressly overruled in the case at bar" (677).

* * * * * *

"The plaintiff seasonably filed a petition for a rehearing in which it * * * asserted * * * that in applying the new construction of Article 4 of chapter 119 to the case at bar and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the 14th Amendment. The additional Federal claim thus was timely since it was raised at the first opportunity" (677).

Just so, the decision of the Supreme Court of New Jersey, in the case at bar, overruled previous decisions which were recognized as authority.

The petitioner herein seasonably filed a petition for rehearing, (within the ten days allowed by rule 1:9-4 of the Supreme Court of New Jersey (see Appendix, p. 1a, *infra*) asserting that it contravened the due process clause of the 14th Amendment.

Therefore, the Federal claim thus made was timely.

The decision in this case by the Supreme Court of New Jersey is reviewable by this court because it applies state

statutes as to which there was insistence that if so applied the statutes were void under the Federal Constitution (R. 91).

In *Fiske* v. *Kansas,* 274 U. S. 380, 385, this Court said:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is therefore reviewable" &c.

The facts in this case amply disclose that the petitioner has never had an opportunity to be heard upon her insistence that she has been deprived of her property without due process of law by the decision in this case of the highest court in New Jersey.

Therefore, when the Supreme Court of New Jersey denied her petition for rehearing, it denied her the right to be heard upon her Federal claim in this case and she has been deprived of property without due process of law in violation of the provisions of the 14th Amendment [Article XIV, Section 1 of the Amendments to the United States Constitution].

II.

The United States Supreme Court has not heretofore determined whether or not, in view of the 14th Amendment to the United States Constitution, title in fee simple absolute can be acquired to property by the exercise of the right of eminent domain supplemented by legislative acts.

Whether or not the "due process of law" clause in the 14th Amendment to the United States Constitution bars a condemnor from acquiring a title to private property in fee simple absolute merely by the exercise of the right of eminent domain, supplemented by Legislative Acts, is a Federal question of substance not heretofore determined by this Court.

Diligent search has failed to reveal any such decision and neither the New Jersey courts, in their decisions in this case, nor the attorneys for the adverse parties herein have cited or referred to any such case.

On the contrary, the decisions of the New Jersey courts, prior to this case, have held that title in fee simple absolute could not be thus acquired.

(*Summerill* and *Frelinghuysen* cases, *supra.*)

In her petition for rehearing, the petitioner raised this question before the Supreme Court of New Jersey but that court dismissed the petition without any comment or decision of any kind upon the question so presented, and merely entered an order that the petition for rehearing be denied (R. 102).

However, a case was found in which this court considered the power of the legislature of Rhode Island to

ratify and confirm a title to land in that state, based upon a license granted to an executrix in the State of New Hampshire, to sell lands of the deceased testator to pay his debts, and such power was denied.

Wilkinson v. *Leland,* 2 Peters 627, 655 and 657-658, 7 L. Ed. 542, 552 and 553.

Page 552:

"The sale, therefore, made by the executrix • • • in virtue of the said license was utterly void; and the deed given thereupon was, *proprio vigore,* inoperative to pass any title of the testator to any lands described therein."

"The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them —a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention. In Terrett *v.* Taylor, (9 Cranch. 43), it was held by this court that a grant or title to lands once made by the Legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republic government, and with the right of the citizens to the free enjoyment of their property lawfully acquired.

"We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union.

> "On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

It would seem to necessarily follow that if a State could not transfer directly to a private person (other than the condemnee or those claiming under her) the title of the condemnee to the lands in question, it could not authorize, by legislative action, such transfer to be made by a condemnor who had acquired title thereto by Eminent Domain proceedings.

It cannot be successfully denied that the Supreme Court of New Jersey, by its judgment in this case, adjudging that, under the provisions of the statute granting to the condemnor the right to exercise the power of Eminent Domain, the condemnor acquired, without the consent of the condemnee, Emma Maslin, a fee simple absolute title to her property described in the complaint in this action, involves exactly the same principles that this court considered in the *Wilkinson* case, *supra.*

In that case, at page 658, this Court said:

> "We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to their Legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine."

Therefore, the petitioner has, by the judgment of the Supreme Court of New Jersey in this case, been deprived of property without due process of law, in violation of the provisions of Article XIV, Section 1, of the Amendments to the United States Constitution.

III.

The United States Supreme Court has not heretofore determined whether or not, where the estate to be taken under eminent domain proceedings is not expressly defined, and an easement is sufficient for the purpose, no greater estate can be taken.

Whether or not the "due process of law" clause in the 14th Amendment aforesaid bars a condemnor from acquiring any greater estate than is necessary to be taken for the purpose for which the property is being taken is a Federal question of substance not heretofore determined by this Court.

But both subordinate Federal and State courts have recognized the rule to be that the extent of the estate which may be taken, where it is not expressly defined, is no greater than is necessary for the public use to be served.

> *Superior Oil Co.* v. *Harsh,* 39 Fed. Sup. 467, U. S. Dist. Ct. (1941).

At page 471 (quoting from *Miller* v. *Commissioners,* 116 N. E. 178, 181, Ill. Sup. Ct. 1917):

> "Where the estate to be taken is not expressly defined, only such an estate will vest as is necessary to accomplish the purpose in view, and where an easement is sufficient for that purpose no greater estate can be taken."
>
> "The grant of power to take the land of an individual by the exercise of eminent domain is strictly construed and the extent of the estate which may be taken is no greater than is necessary for the public use to be served."

In the *Superior Oil* case, the Court further said at page 470:

> "The title of the school trustees was the statutory title granted by the legislature, title by acts of eminent domain, a taking with consent of the owner for the use of the inhabitants of the township for school purposes."
>
> "There is no evidence that the school trustee procured any other kind of title, or that they ever made any claim to any other kind of title, and, under the statute, they could by their acts obtain only such title as was necessary for the statutory purposes, that is, conduct of a school."

And on page 471:

> "Their title was merely to use the property for school purposes; there is no justification for its extension by implication."

If this Court shall also rule that this test is the true rule by which the extent of the estate to be taken is to be determined, then the adjudication by the Supreme Court of New Jersey, that in the case at bar, the Board of Education, the condemnor took an estate in fee simple absolute, is repugnant to the "due process of law" clause and should be reversed.

IV.

The Supreme Court of New Jersey has, in this case, decided a Federal question in a way not in accord with the applicable decisions of this Court.

This Court has not heretofore determined, in so many words, that title in fee simple absolute cannot be acquired by condemnation proceedings.

But it has held that a legislative act to transfer the property of A to B is not a constitutional exercise of legislative power.

Wilkinson v. *Leland*, 2 Peters 627, 658 (see quotation under Point II of this brief).

The judgment of the Supreme Court of New Jersey holding that a title in fee simple absolute was acquired by the Board of Education, the condemnor, by virtue of the proceedings under the Eminent Domain Act, referred to in the complaint herein, is exactly the same in principle as holding that title to the private property of A can be transferred to B by legislative act.

Whether it be done by a special legislative act or by a general legislative act is immaterial to the present inquiry, as is also the question as to whether it is with or without compensation.

The transfer of title, either by special legislative or general legislative act, is equally repugnant to the "due process of law" clause of the 14th Amendment.

Therefore, petitioner contends that the Supreme Court of New Jersey has, in this case, decided a Federal question in a way probably not in accord with the applicable decisions of this Court.

V.

The petitioner has set forth in the third reason relied on for the allowance of the writ in this case her argument in support of her contention that there are special and important reasons for the allowance of the writ.

The argument that the present state of the law requires the decision of this Court to determine the doubt and uncertainty that now prevails concerning the questions presented in this third reason seems to be unanswerable.

And that reason, in itself, is most persuasive that the writ as sought herein should be granted.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari herein should be granted.

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Appendix.

Excerpt from Rules of the Supreme Court of New Jersey.

"1:9-4. Petition for Rehearing.

(a) Within 10 days after judgment is entered, unless the time is enlarged by the order of the court, a party may apply for a rehearing by filing 12 copies of a petition with the court, * * *."